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# Child Witnesses and Procedural Fairness

Bennett L. Gershman<sup>†</sup>

## Abstract

*Professor Gershman's Article notes that courts and lawmakers have changed procedural and evidentiary rules to protect child witnesses in child sexual abuse cases. Gershman discusses how courts apply the changed rules with careful scrutiny in an effort to ensure that the interests of the child witness and the accused defendant are appropriately balanced.*

## I. Introduction

Children as victim witnesses generate unique concerns within the legal system because of their vulnerability, immaturity, and impressionability. Courts and lawmakers increasingly have recognized these concerns and have attempted to adjust substantive, procedural, and evidentiary rules to accommodate the special problems of child witnesses, particularly in the area of child sexual abuse prosecutions. These adjustments have made prosecuting such cases much easier. Broadening the legal rules to enhance the ability to prosecute child abuse cases more effectively also includes the risk that traditional notions of procedural justice will be sacrificed, and therefore innocent defendants will be convicted of especially heinous crimes.<sup>1</sup>

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<sup>1</sup> See *Tome v. United States*, 513 U.S. 150, 166, 115 S. Ct. 696, 705, 130 L. Ed. 2d 574, 588 (1995) ("Courts must be sensitive to the difficulties attendant upon the prosecution of alleged child abusers. In almost all cases a youth is the prosecution's only eyewitness. But '[t]his Court cannot alter evidentiary rules merely because litigants might prefer different rules in a particular class of cases.'" (quoting *United States v. Salerno*, 505 U.S. 317, 322, 112 S. Ct. 2503, 2507, 120 L. Ed. 2d 255, 262 (1992))); *Maryland v. Craig*, 497 U.S. 836, 867-68, 110 S. Ct. 3157, 3175, 111 L. Ed. 2d 666, 692-93 (1990) (noting the increased risk of innocent defendants convicted of particularly heinous crimes) (Scalia, J., dissenting); *United States v. Bighead*, 128 F.3d 1329, 1337 (9th Cir. 1997) (commenting that, "[i]f the rules of evidence are relaxed in order to

As everyone knows, courtroom testimony may be highly traumatic for young children. Various procedural changes have been enacted to protect the child witness's mental and emotional well-being while preparing for and giving such testimony. Statutes in many jurisdictions provide substitutes for live in-court testimony of children. These statutes authorize testimony by closed-circuit television<sup>2</sup> and videotaped depositions.<sup>3</sup> Such procedures necessarily impinge on a defendant's constitutional right to face-to-face confrontation with his accuser.<sup>4</sup> Meaningful confrontation may also be obstructed by rules that insulate the child from having to look at the accused<sup>5</sup> and by rules that limit effective cross-examination.<sup>6</sup> Critical issues include whether such procedures are necessary to protect the child's mental and emotional well-being and whether the court has made individualized findings to justify the

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permit the successful prosecution of such cases, we gravely damage the rights of the accused and invite the repetition, in a new form, of the kind of justice associated with the witchcraft trials of seventeenth-century Salem, Massachusetts.") (Noonan, J., dissenting); *Nelson v. Farrey*, 874 F.2d 1222, 1224 (7th Cir. 1989) ("A growing sensitivity to the prevalence of child abuse in our society has caused an upsurge of prosecutions. . . . Such prosecutions place a strain on traditional notions of procedural justice." (citations omitted)).

Frequently-cited abuses include false accusations, poorly trained professionals, overzealous prosecutors, and procedural shortcuts. *See State v. Michaels*, 136 N.J. 299, 320, 642 A.2d 1372, 1382-83 (1994) (ordering a pretrial taint hearing to protect the defendants against false accusations); *People v. Pitts*, 223 Cal. App. 3d 606, 690, 273 Cal. Rptr. 757, 807 (Ct. App. 1990) (recanting the false accusations of child abuse and overturning the convictions); *see also* STEPHEN J. CECI & MAGGIE BRUCK, *JEOPARDY IN THE COURTROOM: A SCIENTIFIC ANALYSIS OF CHILDREN'S TESTIMONY* (1995) (discussing the many issues surrounding child testimony).

<sup>2</sup> *See infra* notes 61-70 and accompanying text.

<sup>3</sup> *See infra* notes 53-60 and accompanying text.

<sup>4</sup> The Sixth Amendment guarantees an accused the right "to be confronted with the witnesses against him." U.S. CONST. amend VI; *see Coy v. Iowa*, 487 U.S. 1012, 1015, 108 S. Ct. 2798, 2800, 101 L. Ed. 2d 857, 863 (1988) (interpreting constitutional guarantee to require face-to-face confrontation). State constitutions often employ much more demanding language, requiring a literal right to meet one's accuser face-to-face. *See, e.g., People v. Fitzpatrick*, 158 Ill. 2d 360, 365, 633 N.E.2d 685, 688, 198 Ill. Dec. 844, 847 (1994); *Commonwealth v. Bergstrom*, 402 Mass. 534, 553, 524 N.E.2d 366, 377 (1988); *Commonwealth v. Ludwig*, 527 Pa. 472, 480, 594 A.2d 281, 285 (1991).

<sup>5</sup> *See infra* notes 31-37 and accompanying text.

<sup>6</sup> *See infra* notes 45-52 and accompanying text.

procedure. In addition, several jurisdictions have enacted statutes that create new hearsay exceptions for out-of-court statements by children that arguably jeopardize the defendant's constitutional right to confrontation and a fair trial.<sup>7</sup>

Additionally, the numerous reversals of convictions based on the tainted testimony of child witnesses has generated widespread concern about the inherent reliability of such testimony.<sup>8</sup> A very young child initially must be found by a court to be sufficiently competent to give testimony.<sup>9</sup> Indeed, the testimony of children as young as four and five years old has been found sufficiently reliable such that a jury may properly use the testimony to draw ultimate conclusions of guilt or innocence. Finally, the jury's capacity to judge the credibility of child witnesses has been impeded by the increased use of experts in child abuse cases who often give testimony that improperly enhances the child's credibility.<sup>10</sup> The ability of prosecutors to use experts in an attempt to bolster the child's testimony introduces the danger that a jury will accept opinions by highly respected professionals as an endorsement or validation of the child's allegations.

## II. Testimonial Capacity of Young Children

The increased attention given to child sexual abuse and the rights of child victims and child witnesses has required trial courts to carefully scrutinize whether very young children are sufficiently competent to give

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<sup>7</sup> See *infra* notes 71-95 and accompanying text.

<sup>8</sup> See, e.g., *Manson v. Brathwaite*, 432 U.S. 98, 114, 97 S. Ct. 2243, 2253, 53 L. Ed. 2d 140, 154 (1977) (concluding that "reliability is the linchpin in determining the admissibility of [a witness's] identification testimony for both pre- and post-*Stovall* confrontations"); see also Stephen J. Ceci & Richard D. Friedman, *The Suggestibility of Children: Scientific Research and Legal Implications*, 86 CORNELL L. REV. 33, 34 (2000) (stating that "scholars agree that young children are more susceptible than older individuals to leading questions and pressures to conform to the expectations and desires of others").

<sup>9</sup> See *infra* notes 11-30 and accompanying text.

<sup>10</sup> See *infra* notes 96-113 and accompanying text.

testimony.<sup>11</sup> The general rule is that the question of a witness's competency is a matter for the trial judge because the judge has the best opportunity determine first-hand whether the witness has the capacity to give meaningful testimony.<sup>12</sup> The failure of a court to make a sufficiently thorough exploration of a child's testimonial capacity when warranted by the circumstances implicates constitutional guarantees.<sup>13</sup>

There are no rigid rules that address the competency of young children to give testimony.<sup>14</sup> Competency is determined on a case-by-case basis, and courts possess extremely broad discretion in making the determination.<sup>15</sup> A child is presumed to be a competent witness unless the court finds otherwise, and there is no minimum age below which a child is presumed to be incapable of testifying.<sup>16</sup> Indeed, children as young as four and five years old have been found competent to give testimony.<sup>17</sup> As

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<sup>11</sup> See, e.g., 18 U.S.C.A. § 3509 (West 2000) (stating that the "Child Victims' Rights Act" provides various procedural and evidentiary protections for child witnesses).

<sup>12</sup> See, e.g., *Wheeler v. United States*, 159 U.S. 523, 524-25, 16 S. Ct. 93, 93-94, 40 L. Ed. 244, 246 (1895) (stating that the question of child's competency "rests primarily with the trial judge, who sees the proposed witness, notices his manner, his apparent possession or lack of intelligence, and may resort to any examination which will tend to disclose his capacity and intelligence, as well as his understanding of the obligations of an oath").

<sup>13</sup> See, e.g., *State v. Michaels*, 136 N.J. 299, 319, 642 A.2d 1372, 1382 (1994) (holding that pretrial taint hearing is required to determine whether the testimony of a young child meets standards of reliability as required by due process).

<sup>14</sup> The Federal Rules of Evidence provide: "Every person is competent to be a witness except as otherwise provided. . . ." FED. R. EVID. 601. There is no separate provision for determining the competency of young children.

<sup>15</sup> See, e.g., *Blume v. State*, 797 P.2d 664, 668 (Alaska 1990); *Commonwealth v. Allen*, 40 Mass. App. Ct. 458, 461, 665 N.E.2d 105, 108 (App. Ct. 1996); *Commonwealth v. Pankraz*, 382 Pa. Super. 116, 122, 554 A.2d 974, 977 (Super. Ct. 1989).

<sup>16</sup> See 18 U.S.C.A. § 3509(c)(1) (West 2000) (stating that "[a] child is presumed to be competent"); *Wheeler*, 159 U.S. at 524 (stating that "there is no precise age which determines the question of competency"); *Walters v. McCormick*, 122 F.3d 1172, 1176 (9th Cir. 1997) (stating that "[n]o federal court has held that the Constitution places limits on allowing even the youngest child to testify at trial"); *Blume*, 797 P.2d at 668 (stating that "there is no minimum age below which a child is presumed incompetent to testify" (citations omitted)); *Pankraz*, 554 A.2d at 977 (stating that "[a] witness is presumed competent to testify unless proven otherwise").

<sup>17</sup> See, e.g., *Walters*, 122 F.3d at 1174 (four-year-old child); *United States v. Wright*, 119 F.3d 630, 632 (8th Cir. 1997) (four-year-old child); *United States v. Rouse*, 111

with all witnesses, the court must determine that the child possesses sufficient cognitive capacity to observe the occurrence, to remember the subject matter about which the child is called upon to testify, to understand the examiner's questions, to frame intelligent responses, and to be conscious of the obligation to tell the truth.<sup>18</sup> There is no requirement that a child must take an oath to testify truthfully as a precondition to giving testimony,<sup>19</sup> although in some jurisdictions a child's unsworn testimony may require corroboration before it is legally sufficient to convict.<sup>20</sup>

A child's capacity to understand the significance of telling the truth is a source of some disagreement.<sup>21</sup> When a question of a child's

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F.3d 561, 568 (8th Cir. 1997) (five-year-old child); *Sexton v. Howard*, 55 F.3d 1557, 1558-59 (11th Cir. 1995) (five-year-old child); *Blume*, 797 P.2d at 666 (five-year-old child); *Ricketts v. State*, 498 N.E.2d 1222, 1223 (Ind. 1986) (five-year-old child); *State v. Jacques*, 558 A.2d 706, 707 (Me. 1989) (five-year-old child); *State v. Conklin*, 444 N.W.2d 268, 269-70 (Minn. 1989) (four-year-old child); *People v. Groff*, 71 N.Y.2d 101, 104, 518 N.E.2d 908, 909, 524 N.Y.S.2d 13, 14 (1987) (four-year-old child); *Pankraz*, 554 A.2d at 975 (four-year-old child).

<sup>18</sup> See *Commonwealth v. Hart*, 501 Pa. 174, 177, 460 A.2d 745, 747 (1983).

<sup>19</sup> The Federal Rules of Evidence require that every witness either take an oath or affirm that he will testify truthfully. FED. R. EVID. 603. The advisory committee's note to Rule 603 observes that "the rule is designed to afford the flexibility required in dealing with religious adults, atheists, conscientious objectors, mental defectives, and children." *Id.* (advisory committee's notes). The Note further explains that an "[a]ffirmation is simply a solemn undertaking to tell the truth; no special verbal formula is required." *Id.*

<sup>20</sup> See, e.g., N.Y. CRIM. PROC. LAW § 60.20(3) (McKinney 2001) (noting that a defendant may not be convicted "solely upon unsworn evidence"). Corroborative evidence is legally sufficient if it tends to establish the commission of the crime and that the defendant is connected with its commission. See *People v. Groff*, 71 N.Y.2d 101, 104, 518 N.E.2d 908, 909, 524 N.Y.S.2d 13, 14 (1987).

<sup>21</sup> Arguably, a child who lacks sufficient understanding of the concept of truth or the obligation to testify truthfully cannot be meaningfully cross-examined consistent with the Sixth Amendment's confrontation requirement. Compare *Walters*, 122 F.3d at 1175 (finding no constitutional violation although child witness "may not have understood the oath she took"); *Blume*, 797 P.2d at 668 n.4 (stating that "[a]n abstract understanding of the significance of the oath or of the concept of truthfulness is thus unnecessary so long as a child understands the need to testify candidly" (relying on *Sevier v. State*, 614 P.2d 791, 794 (Alaska 1980)); and *Groff*, 518 N.E.2d at 909 (involving a child who stated that she did not know the difference between telling the truth and telling a lie and was permitted to give unsworn testimony), with *Walters*, 122 F.3d at 1182 (contending that "[b]ecause she did not know what truth-telling is she was not a witness within the meaning of the Sixth Amendment . . . [and] could not be subjected to cross-examination within the meaning of the Sixth Amendment.") (Noonan, J., dissenting); *Seccia v. State*,

competency is raised, a trial judge typically will examine the child in the jury's presence.<sup>22</sup> When compelling reasons exist, however, a court may be required to conduct an evidentiary hearing outside the jury's presence to determine the child's fitness to testify.<sup>23</sup> The procedures at a pre-testimonial competency examination are tailored to enable the court to ascertain whether the child can answer simple questions.<sup>24</sup> The judge typically conducts much of the examination, and the attorneys may submit questions or question the child directly. The court may also question other witnesses, particularly experts who may have interviewed the child.<sup>25</sup>

Some courts have required a pretrial "taint" hearing when a sufficient showing has been made that the child's capacity to give reliable testimony has been impaired by coercive or suggestive interviewing techniques.<sup>26</sup> In *State v. Michaels*, the New Jersey Supreme Court outlined the factors that should be considered in determining whether a child's competency

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689 So. 2d 354, 356 (Fla. Dist. Ct. App. 1997) (noting that "knowing the difference between the truth and a lie does not impute a moral obligation or sense of duty to be truthful") (quoting *Wade v. State*, 586 So. 2d 1200, 1204 (Fla. Dist. Ct. App. 1991)).

<sup>22</sup> See, e.g., *Commonwealth v. Allen*, 40 Mass. App. Ct. 458, 460, 665 N.E.2d 105, 107 (App. Ct. 1996).

<sup>23</sup> See, e.g., 18 U.S.C.A. § 3509(c) (West 2000); *Walters*, 122 F.3d at 1176; *Blume*, 797 P.2d at 667; *Commonwealth v. Pankraz*, 382 Pa. Super. 116, 554 A.2d 974, 978 (Super. Ct. 1989).

<sup>24</sup> 18 U.S.C.A. § 3509(c)(8) (West 2000) (stating that "[t]he questions asked at the competency examination of a child shall be appropriate to the age and developmental level of the child, shall not be related to the issues at trial, and shall focus on determining the child's ability to understand and answer simple questions").

<sup>25</sup> See, e.g., *Blume*, 797 P.2d at 667. The extent to which the defense may interview young child victims prior to trial may depend on whether the child is in the custody of a social services agency. See *United States v. Rouse*, 111 F.3d 561, 566 (8th Cir. 1997) (finding "[w]hen a child witness is in the legal custody of a social services agency, that agency as custodian may refuse requests for pretrial interviews" (citations omitted)).

<sup>26</sup> See, e.g., *State v. Michaels*, 136 N.J. 299, 306, 642 A.2d 1372, 1375 (1994) (noting that, "[l]ike confessions and identification, the inculpatory capacity of statements indicating the occurrence of sexual abuse and the anticipated testimony about those occurrences requires that special care be taken to ensure their reliability"); *Allen*, 665 N.E.2d at 108 (assuming the propriety of pretrial taint hearing and recognizing that the defendant's offer of proof that the victim's statements were the product of suggestive or coercive interview techniques is insufficient to trigger the need for a hearing).

or testimonial reliability is the product of coercive or suggestive pretrial interviewing techniques.<sup>27</sup> The court determined that such factors include “the absence of spontaneous recall, interviewer bias, repeated leading questions, multiple interviews, incessant questioning, vilification of [the] defendant, ongoing contact with peers and references to their statements, and the use of threats, bribes, and cajoling, as well as the failure to videotape or otherwise document the initial interview sessions.”<sup>28</sup>

Defense experts have been permitted to testify at trial regarding suggestive or coercive interviewing methods and techniques employed upon child victims.<sup>29</sup> Furthermore, the exclusion of such testimony may be deemed reversible error.<sup>30</sup>

### III. Physical Obstructions to Face-to-Face Confrontation

Various obstructions to face-to-face confrontation—including screens, courtroom seating arrangements, and closed-circuit television—have been employed ostensibly to protect the child witness from being traumatized by having to look at the defendant. Yet, in *Coy v. Iowa*, the Supreme Court struck down a state procedure that permitted child witnesses in sexual abuse cases to testify with a screen placed between the defendant and

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<sup>27</sup> 136 N.J. 299, 321, 642 A.2d 1372, 1383 (1994).

<sup>28</sup> *Michaels*, 642 A.2d at 1383; *see also* *Idaho v. Wright*, 497 U.S. 805, 826-27, 110 S. Ct. 3139, 3152, 111 L. Ed. 2d 638, 659 (1990) (finding that, although the Constitution does not impose any fixed set of procedural safeguards on interview process, the totality of the circumstances surrounding a child’s responses to an examining physician’s questions are not sufficiently trustworthy to qualify as a hearsay exception in view of the leading questions, manipulation, and prompting by the interrogator).

<sup>29</sup> *See Wright*, 497 U.S. at 812-13; *United States v. Rouse*, 111 F.3d 561, 570-71 (8th Cir. 1997); *State v. Hulbert*, 481 N.W.2d 329, 331 (Iowa 1992); *People v. Alvarez*, 607 N.Y.S.2d 573, 574, 159 Misc. 2d 963, 965 (Crim. Ct. 1993); *see also* *State v. Gersin*, 76 Ohio St. 3d 491, 494, 668 N.E.2d 486, 488 (1996) (describing special interviewing protocols used to elicit information from child victims who are immature, frightened, or confused).

<sup>30</sup> *See State v. Malarney*, 617 So. 2d 739, 740 (Fla. Dist. Ct. App. 1993); *State v. Sloan*, 912 S.W.2d 592, 596 (Mo. Ct. App. 1995). *But see* *United States v. Rouse*, 111 F.3d 561, 572 (8th Cir. 1997) (finding harmless error).



the accusing witness based on a statutory presumption that the screen was necessary to protect the child from the traumatic effect of testifying in court.<sup>31</sup> The large screen blocked the defendant from the witness's view but allowed the defendant to dimly observe the witness.<sup>32</sup> The Court found that this procedure violated the defendant's Sixth Amendment right to face-to-face confrontation.<sup>33</sup> Justice Scalia, writing for the Court, emphasized the "irreducible literal meaning" of the Sixth Amendment which "[s]imply as a matter of English" . . . confers at least "a right to meet face to face all those who appear and give evidence at trial."<sup>34</sup> Moreover, to the extent that any exceptions to the defendant's literal right to confront witnesses might be available, the generalized legislative presumption of harm necessitating the screen did not create such an exception.<sup>35</sup>

Trial courts have occasionally authorized changes in courtroom seating arrangements so that the child witness would be shielded from having to look directly at the defendant's face.<sup>36</sup> Although such procedures arguably impinge on the defendant's confrontation rights, courts have held either that the procedure is not error or, more likely, that the violation is harmless.<sup>37</sup>

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<sup>31</sup> 487 U.S. 1012, 1020-21, 108 S. Ct. 2798, 2803, 101 L. Ed. 2d 857, 862 (1988).

<sup>32</sup> *Coy*, 487 U.S. at 1014-15.

<sup>33</sup> *Id.* at 1020-21.

<sup>34</sup> *Id.* at 1016 (quoting *California v. Green*, 339 U.S. 149, 175, 90 S. Ct. 1930, 1943-44, 26 L. Ed. 2d 489, 505 (1970)). The Court observed that the screen "was specifically designed to enable the complaining witnesses to avoid viewing appellant as they gave their testimony." *Id.* at 1020. As the Court noted, "[i]t is difficult to imagine a more obvious or damaging violation of the defendant's right to a face-to-face encounter." *Id.*

<sup>35</sup> *Id.* The concurring opinion of Justice O'Connor, joined by Justice White, suggested that when a trial court makes a "case-specific finding of necessity . . . [where] the strictures of the Confrontation Clause may give way to the compelling state interest of protecting child witnesses." *Id.* at 1025 (citations omitted). The use of screens to shield a child witness from a defendant is probably permissible under *Coy*. See *Maryland v. Craig*, 497 U.S. 836, 855, 110 S. Ct. 3157, 3169, 111 L. Ed. 2d 666, 682 (1990) (stating that a court must make particularized findings as to the necessity of such procedure).

<sup>36</sup> See, e.g., *People v. Serna*, 214 Cal. App. 3d 229, 262 Cal. Rptr. 602, 604 (Ct. App. 1989); *Commonwealth v. Amirault*, 424 Mass. 618, 653, 677 N.E.2d 652, 674 (1997).

<sup>37</sup> See *Serna*, 262 Cal. Rptr. at 604; *Amirault*, 677 N.E.2d at 674.

## IV. Accompanying Adult Attendants

Child witnesses have the right to be accompanied by an adult attendant to lend emotional support to the child.<sup>38</sup> The adult attendant is allowed to remain in close physical proximity to the child, to hold the child's hand, and to have the child sit on the attendant's lap throughout the course of the testimony.<sup>39</sup> The adult attendant is forbidden to assist the child in answering questions or otherwise prompt the child, and the presence of the attendant must be recorded on videotape.<sup>40</sup> Although no particularized showing is necessary to permit an adult attendant to accompany a child, the image of a child sitting on an adult's lap may be so inherently prejudicial that some showing of necessity may be required.<sup>41</sup>

The danger of the accompanying adult attendant vouching for the child's credibility is always present. For example, accompaniment by an adult attendant known to the jury as a victim's rights counselor may implicitly vouch for the child's credibility,<sup>42</sup> and may be far more prejudicial than accompaniment by a parent or relative.<sup>43</sup> In an extreme

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<sup>38</sup> See 18 U.S.C.A. § 3509(i) (West 2000). Statutes in several states similarly authorize such accompaniment to include a parent, counselor, or other attendant designated by the court. See, e.g., *Sexton v. Howard*, 55 F.3d 1557, 1559 (11th Cir. 1995); *Commonwealth v. Pankraz*, 382 Pa. Super. 116, 127, 554 A.2d 974, 980 (Super. Ct. 1989); *State v. Jones*, 178 W. Va. 519, 521, 362 S.E.2d 330, 332 (1987).

<sup>39</sup> See 18 U.S.C.A. § 3509(i) (West 2000). Importantly, a court has broad discretion to allow such contact. *Id.*

<sup>40</sup> *Id.*

<sup>41</sup> See *State v. Rulona*, 71 Haw. 127, 130, 785 P.2d 615, 617 (1990) (stating that, "[e]ven if we assume that the court had the discretion to do so, there is nothing in the minor witness' testimony . . . which shows a compelling necessity for allowing such a prejudicial scenario").

<sup>42</sup> See *State v. Suka*, 70 Haw. 472, 476 n.1, 777 P.2d 240, 242 n.1 (1989) (noting that an accompaniment by parent or guardian is less prejudicial than accompaniment by victim or witness counselor who more likely may be seen as vouching for the witness's credibility) (*overruled in part on other grounds by State v. Holbron*, 80 Haw. 27, 904 P.2d 912 (1995)).

<sup>43</sup> See *Pankraz*, 554 A.2d at 980 n.6 (finding that it was not prejudicial to allow a child to testify while sitting in her grandmother's lap); *Jones*, 362 S.E.2d at 332 (finding no evidence of prejudice to the defendant when the court allowed the child to testify while seated in her foster mother's lap); cf. *Ricketts v. State*, 498 N.E.2d 1222, 1223 (Ind. 1986) (finding that a mother's entry into the courtroom to calm the five-year-old

example of the misuse of this procedure, a state prosecutor questioned the child while the child was seated on the prosecutor's lap, and then interjected helpful cues while the child remained seated on the prosecutor's lap during cross-examination.<sup>44</sup>

## V. Restriction on Cross-Examination

A defendant's Sixth Amendment right to confront his accuser includes not only the right to physically face his accuser,<sup>45</sup> but also the right of cross-examination.<sup>46</sup> Although limitations on cross-examination do not necessarily infringe upon a defendant's right of confrontation,<sup>47</sup> preclusion by a court of an entire relevant area of cross-examination may constitute a violation.<sup>48</sup>

A court may likely find the limitations on the cross-examination of a child sexual abuse victim more constitutionally acceptable than a similar

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child and advise her that it was proper to touch a doll where the defendant had touched her is permissible).

<sup>44</sup> See *Sexton v. Howard*, 55 F.3d 1557, 1558 (11th Cir. 1995) (stating that, although the court "caution[s] prosecutors to refrain from similar actions in the future," such conduct did not prejudice defendant's right to fair trial).

<sup>45</sup> See *Coy v. Iowa*, 487 U.S. 1012, 1016, 108 S. Ct. 2798, 2801, 101 L. Ed. 2d 857, 864 (1988).

<sup>46</sup> See *Kentucky v. Stincer*, 482 U.S. 730, 736, 107 S. Ct. 2658, 2662, 96 L. Ed. 2d 631, 641 (1987) (stating that cross-examination "is critical for ensuring the integrity of the fact-finding process" and "is 'the principal means by which the believability of a witness and the truth of his testimony are tested'" (citations omitted)).

<sup>47</sup> See, e.g., *Delaware v. Van Arsdall*, 475 U.S. 673, 684, 106 S. Ct. 1431, 1438, 89 L. Ed. 2d 674, 684 (1986) (explaining that, in order to determine whether the restriction was error or whether the error was harmless, the court should examine "the importance of the witness' testimony . . . , whether the testimony was cumulative, the presence or absence of evidence corroborating or contradicting the testimony of the witness on material points, the extent of cross-examination otherwise permitted, and . . . the overall strength of the prosecution's case"); *State v. Wiley*, 676 A.2d 321, 324 (R.I. 1996) (holding that restrictions on the extensive cross-examination of a child into prior acts of misconduct are not violative of the confrontation clause).

<sup>48</sup> See, e.g., *Davis v. Alaska*, 415 U.S. 308, 320, 94 S. Ct. 1105, 1112, 39 L. Ed. 2d 347, 355 (1974) (holding that a state's interest in protecting a juvenile offender does not take precedence over the defendant's right to cross-examine the witness on bias); *United States v. Lonedog*, 929 F.2d 568, 570 (10th Cir. 1991) (noting that it is constitutional error to preclude an entire line of cross-examination).

limitation of an adult's testimony in a non-sexual abuse case. First, evidence of a victim's past sexual activity is generally excluded by rape shield laws in effect in virtually every jurisdiction.<sup>49</sup> Second, courts have interpreted confrontation requirements somewhat less stringently with respect to child witnesses.<sup>50</sup> Nevertheless, because "[t]he central concern of the Confrontation Clause is to ensure the reliability of the evidence against a criminal defendant by subjecting it to rigorous testing,"<sup>51</sup> any ruling that significantly restricts cross-examination of a child witness into relevant areas, absent any showing of necessity, is presumptively unconstitutional.<sup>52</sup>

## VI. Videotaped Testimony

The use of alternatives to live in-court testimony of children is increasingly being employed. One method progressively used is the videotaping of child witness testimony. Videotaped depositions are seen as balancing the defendant's constitutional right to confront his accuser with the state's interest in protecting vulnerable children from the traumatic experience of live courtroom testimony. When a proper showing has been made that a child would suffer mental or emotional distress from testifying in open court,<sup>53</sup> the court may order that the

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<sup>49</sup> See FED. R. EVID. 412. The guarantees of the Sixth Amendment are also subordinated to discovery requirements. Thus, in *Michigan v. Lucas*, the Supreme Court overturned a court of appeals finding that it is unconstitutional under the Sixth Amendment to preclude a defendant from offering evidence of a victim's prior sexual conduct with the defendant based on a defendant's violation of a discovery rule. 500 U.S. 145, 152-53, 111 S. Ct. 1743, 1748, 114 L. Ed. 2d 205, 214-15 (1991); see also *United States v. Rouse*, 111 F.3d 561, 569 (8th Cir. 1997) (upholding the preclusion of evidence of arguably relevant proof of past sexual conduct for failure to give timely notice).

<sup>50</sup> See, e.g., *Maryland v. Craig*, 497 U.S. 836, 849, 110 S. Ct. 3157, 3165, 111 L. Ed. 2d 666, 672 (1990); *Globe Newspaper Co. v. Superior Ct.*, 457 U.S. 596, 607, 102 S. Ct. 2613, 2620, 73 L. Ed. 2d 248, 255 (1982); *Wiley*, 676 A.2d at 324.

<sup>51</sup> *Craig*, 497 U.S. at 845.

<sup>52</sup> See, e.g., *United States v. Begay*, 937 F.2d 515, 523 (10th Cir. 1991); *State v. Jacques*, 558 A.2d 706, 708 (Me. 1989); *State v. Reinart*, 440 N.W.2d 503, 506 (N.D. 1989).

<sup>53</sup> Such a finding may be based on the court's own observations and questioning of the child. There is no requirement that an expert support the court's determination. See

child's deposition be taken prior to trial and preserved by videotape for possible use at trial in lieu of the child's live testimony.<sup>54</sup> Statutes typically specify the persons who may be present at the deposition,<sup>55</sup> as well as the procedures that must be followed to ensure that the defendant's constitutional rights are protected.<sup>56</sup> Appellate courts have reversed convictions when the trial courts admitted videotaped depositions under statutes that fail to comply with constitutional standards.<sup>57</sup> Such statutes

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United States v. Rouse, 111 F.3d 561, 569 (8th Cir. 1997) (stating that the federal statute "does not require an expert to support a 'because of fear' finding"); State v. Crandall, 120 N.J. 649, 662, 577 A.2d 483, 489 (1990) (finding "the vast majority of jurisdictions . . . have concluded that expert testimony is not necessarily required to justify use of the statutory procedure").

<sup>54</sup> See, e.g., 18 U.S.C.A. § 3509(b)(2) (West 2000) (authorizing the videotaped deposition when a child is likely to be unable to testify in open court because of fear, emotional trauma, mental or other infirmity, or conduct by the defendant or defense counsel). Videotaped depositions are allowed in some instances when the witness is unavailable. See, e.g., United States v. Mueller, 74 F.3d 1152, 1156-57 (11th Cir. 1996) (finding the deposition of a foreign witness admissible and not violative of the confrontation clause); United States v. Kelly, 892 F.2d 255, 261 (3d Cir. 1989) (finding the videotaped deposition of a foreign witness admissible because the witness was unavailable if the deposition "contains sufficient 'indicia of reliability'"). But see Lam v. Iowa, 860 F.2d 873, 875 (8th Cir. 1988) (concluding that the admission of a videotape of the witness's deposition was error because of an insufficient showing that the witness's presence could not be obtained at trial).

<sup>55</sup> See, e.g., 18 U.S.C.A. § 3509(b)(1)(D) (West 2000) (stating that such persons include a judicial officer appointed by the court, the child, the prosecutor, defense counsel, the child's attorney or guardian ad litem, persons necessary to operate the videotape equipment, and other persons who may be necessary to insure the child's welfare).

<sup>56</sup> See 18 U.S.C.A. § 3509(b)(2)(vi) (West 2000) (stating that "[t]he defendant shall be afforded the rights applicable to defendants during trial, including the right to an attorney, the right to be confronted with the witness against the defendant, and the right to cross-examine the child"); see also State v. Marquis, 241 Conn. 823, 825, 699 A.2d 893, 895 (1997) (concluding that the court has the authority to order that the child first be examined by an expert for the defense before deciding whether to grant the prosecutor's motion for videotaped testimony).

<sup>57</sup> See Lowery v. Collins, 988 F.2d 1364, 1368 (5th Cir. 1993) (finding that the admission of an ex parte videotaped interview without any showing of necessity violates the defendant's confrontation rights despite the defendant's ability to call and examine the child at trial because "forcing a defendant to call a child complainant to testify in order to cross-examine that individual creates a risk of inflaming the jury against a criminal defendant and also unfairly requires a defendant to choose between his right to cross-examine a complaining witness and his right to rely on the State's burden of

violate the confrontation rights of defendants by permitting *ex parte* videotaped statements to be admitted without any showing of need and without contemporaneous cross-examination.<sup>58</sup> Statutes, although facially constitutional, may also be applied in a manner that violates a defendant's constitutional confrontation rights.<sup>59</sup> For example, child abuse statutes that permit videotaped depositions based on individualized findings of necessity will most likely satisfy constitutional mandates.<sup>60</sup>

## VII. Closed-Circuit Television

Another alternative to live in-court testimony is the use of closed-circuit television to telecast the testimony of a child witness. Closed-circuit television may be used if the court finds that there is a substantial likelihood that the child would suffer mental or emotional distress if

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proof in a criminal case" (citations omitted)); *State v. Taylor*, 196 Ariz. 584, 588, 2 P.3d 674, 678 (Ct. App. 2000) (finding a statute that authorized videotaped statements to be unconstitutional and infringing on the judiciary's powers); *State v. Bastien*, 129 Ill. 2d 64, 67, 541 N.E.2d 670, 676, 133 Ill. Dec. 459, 465 (1989) (finding a statute allowing *ex parte* videotaped testimony unconstitutional as denying the defendant a right to contemporaneous cross-examination); *State v. Pilkey*, 776 S.W.2d 943, 948 (Tenn. 1989) (holding unconstitutional a statute that allows the *ex parte* videotaped statement of a child when either party may call the child as a witness and stating, "the effect is that the State may produce evidence in chief by an unsworn witness, and the accused is then forced to call the child, if desired, as a witness for direct examination").

<sup>58</sup> See *Bastien*, 541 N.E.2d at 675 (finding *ex parte* videotaped statements are in effect hearsay evidence and, in the absence of contemporaneous cross-examination, they present a danger that the child's statements will "'harden and become unyielding'" even in the face of subsequent cross-examination) (quoting *State v. Saporen*, 205 Minn. 358, 362, 285 N.W. 898, 901 (1939)).

<sup>59</sup> See *State v. Vincent*, 159 Ariz. 418, 432, 768 P.2d 150, 164 (1989) (stating that a videotaped deposition conducted in the defendant's absence without any individualized showing of necessity for protection violated the defendant's Sixth Amendment right to confrontation). But see *Thomas v. Gunter*, 962 F.2d 1477, 1484 (10th Cir. 1992) (determining videotaped depositions taken outside the defendant's physical presence were not violative of the defendant's confrontation rights where particularized findings were made that the children would be unable to testify when seeing the defendant in court); *State v. Thomas*, 150 Wis. 2d 374, 393, 442 N.W.2d 10, 19-20 (1989) (finding videotaped deposition where child could not see defendant upheld based on individualized showing of need for protection).

<sup>60</sup> See, e.g., *State v. Spigarolo*, 210 Conn. 359, 365, 556 A.2d 112, 117-18 (1989); *Glendening v. State*, 536 So. 2d 212, 219 (Fla. 1988).

required to testify in open court.<sup>61</sup> In *Maryland v. Craig*, the Supreme Court upheld the constitutionality of a statutory procedure permitting a victim of child abuse to testify at trial outside the presence of the judge, jury, and defendant, via one-way closed-circuit television.<sup>62</sup> The statute required the judge to determine that the child's courtroom testimony would result in the child suffering serious emotional distress so that the child would be unable to reasonably communicate.<sup>63</sup>

Face-to-face confrontation, the Court emphasized in *Craig*, "is not the *sine qua non* of the confrontation right."<sup>64</sup> The Court listed three findings

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<sup>61</sup> See *Maryland v. Craig*, 497 U.S. 836, 853-54, 110 S. Ct. 3157, 3167-68, 111 L. Ed. 2d 666, 683-84 (1990) (noting that twenty-four states allow the use of one-way closed-circuit television testimony and eight states use a two-way system under which the child-witness can view the courtroom and the defendant on a video monitor while the jury, judge, and defendant can view the child during testimony); *United States v. Weekley*, 130 F.3d 747, 752-54 (6th Cir. 1997) (allowing closed-circuit televised testimony supported by an expert's testimony and the court's in camera questioning of child); *State v. Smith*, 158 N.J. 376, 385-87, 730 A.2d 311, 317-18 (1999) (finding the use of closed-circuit television is not limited to situations where that child fears testifying in presence of defendant but is permitted when child's fears stem from courtroom atmosphere or presence of jury); see also *United States v. Gigante*, 971 F. Supp. 755, 758-59 (E.D.N.Y. 1997) (allowing in a case of first impression, the government, in a RICO prosecution in which its chief witness was too ill to testify in court, to have the witness's testimony taken through closed-circuit television). The two-way closed-circuit television system is used in the federal child witness statute. See 18 U.S.C.A. § 3509(b)(1) (West 2000).

<sup>62</sup> 497 U.S. 836, 851-55, 110 S. Ct. 3157, 3166-69, 111 L. Ed. 2d 666, 682-85 (1990).

<sup>63</sup> *Craig*, 497 U.S. at 842 (citing MD. CODE ANN., CTS. & JUD. PROC. § 9-102(a)(1)(ii) (1989)). The state presented expert testimony suggesting that the child abuse victims would have considerable difficulty testifying in front of the defendant. *Id.* However, expert testimony is not necessary to justify the use of a closed-circuit television procedure. See, e.g., *United States v. Rouse*, 111 F.3d 561, 569 (8th Cir. 1997) (noting that the federal statute does not require expert testimony); *State v. Crandall*, 120 N.J. 649, 662, 577 A.2d 483, 489 (1990) (stating that a vast majority of jurisdictions have concluded that expert testimony is not necessary).

<sup>64</sup> *Craig*, 497 U.S. at 847 (citing *Delaware v. Fensterer*, 474 U.S. 15, 22, 106 S. Ct. 292, 295, 88 L. Ed. 2d 15, 21 (1985)). The Court stated that the "central concern of the Confrontation Clause is to ensure the reliability of the evidence against a criminal defendant by subjecting it to rigorous testing in the context of an adversary proceeding before the trier of fact." *Id.* at 845. The Court further emphasized that the right to face-to-face confrontation may be denied only when it "is necessary to further an important public policy and only where the reliability of the testimony is otherwise assured." *Id.* at 850 (citing *Coy v. Iowa*, 487 U.S. 1012, 1021, 108 S. Ct. 2798, 2803, 101 L. Ed. 2d 857, 867 (1988)).

that a trial court must make before allowing closed-circuit television testimony.<sup>65</sup> First, a court must hear the evidence and determine whether the use of a one-way closed-circuit television procedure is necessary to protect the child's welfare.<sup>66</sup> Second, the court must find that the child would be traumatized not by the courtroom but by the defendant.<sup>67</sup> Third, the court must find that the emotional distress suffered by the child is not "*de minimis*, i.e., more than 'mere nervousness or excitement or some reluctance to testify.'"<sup>68</sup>

Convictions have been set aside based on insufficient findings that the televised procedure is necessary to protect the welfare of a vulnerable witness.<sup>69</sup> Moreover, since the closed-circuit television procedure separates the defendant from his attorney, a court must ensure that the defendant will be provided with the means of private, contemporaneous communication with his attorney during the witness's testimony.<sup>70</sup>

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<sup>65</sup> *Id.* at 855-56.

<sup>66</sup> *Id.* at 855.

<sup>67</sup> *Id.* at 856.

<sup>68</sup> *Id.* at 856 (quoting *Wildermuth v. State*, 310 Md. 496, 524, 530 A.2d 275, 289 (1987)); *see also* *People v. Cintron*, 75 N.Y.2d 249, 263, 551 N.E.2d 561, 569-70, 552 N.Y.S.2d 68, 76-77 (1990) (noting that the determination must be based on something more than subjective impressions of trial judge); *People v. Henderson*, 554 N.Y.S.2d 924, 928-29, 156 A.D.2d 92, 99-101 (App. Div. 1990) (finding the vulnerability and necessity of procedure based on the testimony of a social worker not supported by sufficient evidence). The federal statute provides that the two-way closed-circuit television procedure may be employed when the judge finds that the emotional or mental impact on the child "is so substantial as to justify an order." 18 U.S.C.A. § 3509(b)(1)(C) (West 2000).

<sup>69</sup> *See United States v. Moses*, 137 F.3d 894, 898 (6th Cir. 1998) (finding reversible error to allow a child to testify by closed-circuit television because of an insufficient showing that child was fearful of the defendant and the lack of the qualifications of a social worker to give an opinion that the child would suffer trauma if she testified); *State v. Bray*, 342 S.C. 23, 29, 535 S.E.2d 636, 639-40 (2000) (concluding that the trial court failed to determine from strong, specific, and persuasive evidence that the child was too afraid of the defendant to testify in an open court and that forcing such testimony would cause the child to suffer irreparable harm).

For other cases finding reversible error, *see Cumbie v. Singletary*, 991 F.2d 715, 722-23 (11th Cir. 1993); *Cintron*, 551 N.E.2d at 571-72; *Henderson*, 554 N.Y.S.2d at 929.

<sup>70</sup> *See Craig*, 497 U.S. at 842 (noting statute requires mandating instantaneous communication between the defendant and his counsel during a witness's testimony); *State v. Warford*, 223 Neb. 368, 377, 389 N.W.2d 575, 581-82 (1986) (stating that, "[a]t



## VIII. Hearsay Evidence

Courts have increasingly resorted to the admission of out-of-court statements of young children to prove the defendant's guilt.<sup>71</sup> Traditionally rooted exceptions,<sup>72</sup> residual exceptions,<sup>73</sup> and newly enacted exceptions for out-of-court statements by young children have been invoked to support admissibility.<sup>74</sup> Such evidence is often highly

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the very least, the defendant must at all times have a means of communicating with his attorneys").

The federal statute mandates that the trial judge provide the defendant and his counsel with the means of private, contemporaneous communication. *See* 18 U.S.C.A. § 3509(b)(1)(D)(iv) (West 2000); *see also* *United States v. Miguel*, 111 F.3d 666, 670-71 (9th Cir. 1997) (refusing to provide instantaneous communication with counsel but error was harmless); *Myles v. State*, 602 So. 2d 1278, 1280 (Fla. 1992) (reversing conviction where the trial court failed to provide an effective means of contemporaneous communication between the defendant and his attorney).

Plainly, an electronic method of communication such as a telephonic hookup or a walkie-talkie system should be available to ensure private and instantaneous communication. An oral relay system using court bailiffs to deliver messages was condemned in *Myles*, as infringing upon the attorney-client privilege. *Myles*, 602 So. 2d at 1280.

<sup>71</sup> *See, e.g.*, *United States v. Rouse*, 111 F.3d 561, 569-70 (8th Cir. 1997) (noting "a formidable line of Circuit precedent that sanctions the use of hearsay testimony in child sexual abuse cases" (quoting *United States v. St. John*, 851 F.2d 1096, 1098 (8th Cir. 1988)); *Nelson v. Farrey*, 874 F.2d 1222, 1229 (7th Cir. 1989) (recognizing that "[t]he question is whether allowing the statements into evidence create[s] a serious danger of a miscarriage of justice"); *see also* *United States v. Eagle*, 137 F.3d 1011, 1015 (8th Cir. 1998) (holding that a notice of intent to offer such statements fails to provide sufficient details but is not plain error).

<sup>72</sup> *See* *White v. Illinois*, 502 U.S. 346, 356-57, 112 S. Ct. 736, 743, 116 L. Ed. 2d 848, 859 (1992) (discussing the admissibility of the spontaneous declaration and medical examination exceptions to the hearsay rule).

<sup>73</sup> *See* *Idaho v. Wright*, 497 U.S. 805, 817-18, 110 S. Ct. 3139, 3147-48, 111 L. Ed. 2d 638, 653-54 (1990) (discussing the admissibility of the out-of-court statement of a child under the state's residual exception equivalent of Federal Rule of Evidence 803(24)).

<sup>74</sup> *See, e.g.*, *People v. McClure*, 779 P.2d 864, 865-67 (Colo. 1989); *Perez v. State*, 536 So. 2d 206, 209 (Fla. 1988); *State v. Pendleton*, 10 Kan. App. 2d 26, 28-32, 690 P.2d 959, 962-64 (Ct. App. 1984); *State v. Ryan*, 103 Wash. 2d 165, 169-70, 691 P.2d 197, 201-02 (1984).

reliable.<sup>75</sup> On the other hand, absent contemporaneous adversarial truth-testing, such evidence often “poses too serious a threat to the accuracy of the verdict to be countenanced by the Sixth Amendment.”<sup>76</sup>

In *Idaho v. Wright*,<sup>77</sup> the Supreme Court held that out-of-court statements by a three-year-old child to an examining pediatrician were unreliable and erroneously admitted into evidence at trial.<sup>78</sup> The Court found “no special reason for supposing that the incriminating statements about the child’s own abuse were particularly trustworthy.”<sup>79</sup> The statements were made under “blatantly” suggestive interviewing techniques.<sup>80</sup> To overcome the presumption of inadmissibility of such

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<sup>75</sup> See *Nelson*, 874 F.2d at 1229 (noting that “it appears that children rarely fabricate reports of sexual abuse” (citations omitted)). But see *Maryland v. Craig*, 497 U.S. 836, 868, 110 S. Ct. 3157, 3157, 111 L. Ed. 2d 666, 693 (1990) (stating that “[s]ome studies show . . . children are substantially more vulnerable to suggestion than adults, and often unable to separate recollected fantasy (or suggestion) from reality”) (Scalia, J., dissenting, joined by Brennan, Marshall & Stevens, JJ.) (citations omitted)).

<sup>76</sup> *Lee v. Illinois*, 476 U.S. 530, 545, 106 S. Ct. 2056, 2064, 90 L. Ed. 2d 514, 528-29 (1986); see *United States v. Sumner*, 204 F.3d 1182, 1186 (8th Cir. 2000) (holding the admission of a child victim’s hearsay statement to a clinical psychologist violated the Sixth Amendment Confrontation Clause); *United States v. Beaulieu*, 194 F.3d 918, 920 (8th Cir. 1999) (finding the mother’s out-of-court statements were improperly admitted as prior consistent statements allegedly to rebut a charge of recent fabrication or as statements for the purposes of medical diagnosis or treatment); *State v. Hinnant*, 351 N.C. 277, 289, 523 S.E.2d 663, 671 (2000) (concluding hearsay testimony of a child victim is not admissible under the medical diagnosis and treatment exception to hearsay rule).

There is a “presumption of inadmissibility accorded accusatory hearsay statements not admitted pursuant to a firmly rooted hearsay exception.” *Idaho v. Wright*, 497 U.S. 805, 827, 110 S. Ct. 3139, 3152, 111 L. Ed. 2d 638, 659-60 (1990) (citing *Lee*, 476 U.S. at 543).

<sup>77</sup> 497 U.S. 805, 110 S. Ct. 3139, 111 L. Ed. 2d 638 (1990).

<sup>78</sup> See *Wright*, 497 U.S. at 826-27. The child was unavailable as a witness and the statements were admitted under the state’s hearsay exception for statements that are not specifically covered by any other exception but have equivalent circumstantial guarantees of trustworthiness, was offered to prove a material fact, was more probative than any other available evidence, and served the interests of justice by its admission. *Id.* at 812 (citing *IDAHO R. EVID.* 803).

<sup>79</sup> *Id.* at 826. By contrast, a statement that qualifies for admission under a firmly rooted hearsay exception is “so trustworthy that adversarial testing would add little to [its] reliability.” *Id.* at 820-21 (citing *California v. Green*, 399 U.S. 149, 161, 90 S. Ct. 1930, 1936, 26 L. Ed. 2d 489, 498-99 (1970)).

<sup>80</sup> *Id.* at 812-13 (noting the findings by the Idaho Supreme Court included the failure to preserve the interview on videotape, use of “blatantly leading questions,” and that

statements under the Confrontation Clause, the prosecution was required to establish that the statements possessed "particularized guarantees of trustworthiness."<sup>81</sup> Such particularized guarantees of trustworthiness could be satisfied when the prosecution offers a child's out-of-court statement under one of the traditional, deeply rooted hearsay exceptions such as excited utterances,<sup>82</sup> or statements made to physicians for purposes of diagnosis or treatment.<sup>83</sup> However, corroboration of the truth of the statement is not a circumstantial guarantee of the declarant's trustworthiness.<sup>84</sup>

A showing that the child is unavailable is not required under the Confrontation Clause as an antecedent for the statement's admissibility,<sup>85</sup> although a showing of unavailability may be required under state child hearsay exceptions.<sup>86</sup> When the statement is offered under the residual

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the "interrogation was performed by someone with a preconceived idea of what the child should be disclosing").

<sup>81</sup> *Id.* at 815.

<sup>82</sup> *See* FED. R. EVID. 803(2).

<sup>83</sup> *See* FED. R. EVID. 803(4); *see also* *Drumm v. Commonwealth*, 783 S.W.2d 380, 384 (Ky. 1990) (noting that "[f]ederal courts have generally followed a liberal approach" to this exception). This exception would include statements not only to physicians but also to hospital attendants, ambulance drivers, or even members of the declarant's family. FED. R. EVID. 803(4) advisory committee's note. Statements to a case worker who neither diagnosed nor treated the child would not be covered. *See, e.g., United States v. Tome*, 61 F.3d 1446, 1451 (10th Cir. 1995); *Sharp v. Commonwealth*, 849 S.W.2d 542, 545-46 (Ky. 1993). Also inadmissible are statements that go beyond information that is reasonably necessary for diagnosis or treatment. *See, e.g., Tome*, 61 F.3d at 1450; *State v. Coleman*, 673 So. 2d 1283, 1287 (La. Ct. App. 1996) (noting that "[p]atient history . . . may not be used to prove the fact that abuse occurred"). However, the identity of the perpetrator may be reasonably necessary for medical care and treatment, particularly if the perpetrator is a member of the victim's family. *See, e.g., Tome*, 61 F.3d at 1450; *People v. Meeboer*, 181 Mich. App. 365, 372-73, 449 N.W.2d 124, 127 (Ct. App. 1989), *aff'd*, 484 N.W.2d 621 (Mich. 1992).

<sup>84</sup> *See Wright*, 497 U.S. at 824 ("Corroboration of a child's allegations of sexual abuse . . . , for example, sheds no light on the reliability of the child's allegations regarding the identity of the abuser. There is a very real danger that a jury will rely on partial corroboration to mistakenly infer the trustworthiness of the entire statement.").

<sup>85</sup> *See White v. Illinois*, 502 U.S. 346, 353, 112 S. Ct. 736, 741, 116 L. Ed. 2d 848, 854 (1992); *United States v. Inadi*, 475 U.S. 387, 392, 106 S. Ct. 1121, 1124, 89 L. Ed. 2d 390, 394 (1986).

<sup>86</sup> *See State v. Rocha*, 191 Ill. App. 3d 529, 537, 547 N.E.2d 1335, 1340, 138 Ill. Dec. 714, 719 (Ct. App. 1989) (citing cases and indicating that inability or hesitancy

exception,<sup>87</sup> a court must determine that the statement possesses “particularized guarantees of trustworthiness.”<sup>88</sup> Such guarantees may be shown by the child’s mental state,<sup>89</sup> spontaneity,<sup>90</sup> consistent repetition,<sup>91</sup> lack of motive to fabricate,<sup>92</sup> use of terminology unexpected of a child of similar age,<sup>93</sup> and the training and experience of the interviewer.<sup>94</sup> A court’s failure to give a cautionary instruction after admitting an out-of-court statement of a child may be reversible error.<sup>95</sup>

## IX. Experts

Child abuse cases are difficult to prosecute when the crime has left no physical traces, when the principal witness is very young, and when no other corroboration exists. The trial is then a classic credibility contest. The increasing use of expert witnesses in child abuse cases may assist the jury in understanding the otherwise unusual behavior of the victim, but may also unfairly prejudice the defendant to the extent that the expert

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of child to testify constitutes unavailability). *But see* State v. Rohrich, 82 Wash. App. 674, 679, 918 P.2d 512, 514 (Ct. App. 1996) (condemning the prosecutor’s tactic of calling the child to the stand and asking innocuous questions in order to technically comply with the state statute requiring that “[the] child testif[y] at the proceedings” before offering the child’s hearsay statements as a “calculated interference with [the defendant’s] right to fully and effectively cross-examine the child”).

<sup>87</sup> See FED. R. EVID. 807.

<sup>88</sup> See *Wright*, 497 U.S. at 821.

<sup>89</sup> See *id.* (citing *Morgan v. Foretich*, 846 F.2d 941, 948 (4th Cir. 1988)).

<sup>90</sup> See *id.* (citing *State v. Robinson*, 153 Ariz. 191, 201, 735 P.2d 801, 811 (1987)).

<sup>91</sup> See *id.*

<sup>92</sup> See *id.* at 821-22 (citing *State v. Kuone*, 243 Kan. 218, 221-222, 757 P.2d 289, 292-93 (1988)).

<sup>93</sup> See *Wright*, 497 U.S. at 821 (citing *State v. Sorenson*, 142 Wis. 2d 226, 246, 421 N.W.2d 77, 85 (1988)).

<sup>94</sup> See *United States v. Rouse*, 111 F.3d 561, 571-72 (8th Cir. 1997); *United States v. Tome*, 61 F.3d 1446, 1453 (10th Cir. 1995).

<sup>95</sup> See *People v. McClure*, 779 P.2d 864, 866-67 (Colo. 1989) (en banc) (discussing COLO. SESS. L. 1993, ch. 150, § 13-25-129(2) (1987) (stating that, while final instructions to the jury regarding a child’s out-of-court statement will be given, “it is for the jury to determine the weight and credit to be given the statement”)).

vouches for the victim's testimony.<sup>96</sup> Courts commonly agree that experts may not give testimony that directly endorses the credibility of the complaining witness, or opines on the defendant's guilt.<sup>97</sup> Appellate courts find a serious error when an expert asserts directly that the child has been abused,<sup>98</sup> is a truthful person,<sup>99</sup> or that the defendant is guilty of abuse.<sup>100</sup>

Although still admissible, such vouching or bolstering may be accomplished in a variety of less direct ways.<sup>101</sup> A clearly improper tactic is to elicit testimony that a victim of child abuse rarely fabricates,<sup>102</sup> or

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<sup>96</sup> See generally John E.B. Myers et al., *Expert Testimony in Child Sexual Abuse Litigation*, 68 NEB. L. REV. 1 (1989) (offering a comprehensive discussion of the issues).

<sup>97</sup> See, e.g., *State v. Leggett*, 164 Vt. 599, 599-600, 664 A.2d 271, 271-72 (1995). Nor may the defense's expert express an opinion that the complaining witness is untruthful. See *Rouse*, 111 F.3d at 571-72.

<sup>98</sup> See, e.g., *United States v. Velarde*, 214 F.3d 1204, 1211 (10th Cir. 2000) (stating, "testimony which essentially simply vouches for the truthfulness of another witness is impermissible") (citing *United States v. Charley*, 189 F.3d 1251, 1267 (10th Cir. 1999)); *Smith v. State*, 674 So. 2d 791, 794 (Fla. Dist. Ct. App. 1996) (finding error for an expert to testify that the child had been abused); *People v. Seaman*, 657 N.Y.S.2d 242, 244, 239 A.D.2d 681, 682 (App. Div. 1997) (not permitting an expert to insinuate that the victim had been sexually molested).

Some courts distinguish between opinions regarding physical facts observed and reported, about which experts may testify, and opinions regarding the behavior of victims, about which experts may not testify. See *Commonwealth v. Johnson*, 456 Pa. Super. 251, 255-56, 690 A.2d 274, 276-77 (Super. Ct. 1997) (permitting the expert's testimony regarding an allegedly sexually abused child's physical condition).

<sup>99</sup> See, e.g., *Flowers v. State*, 220 Ga. App. 814, 815, 468 S.E.2d 199, 201 (Ct. App. 1996).

<sup>100</sup> See, e.g., *Smith*, 674 So. 2d at 794.

<sup>101</sup> See, e.g., *State v. Alexander*, 254 Conn. 290, 305, 755 A.2d 868, 877 (2000) (granting reversal because a prosecutor improperly expressed her opinion of the victim's credibility and vouched for her witness during her closing argument); *Commonwealth v. LaCaprucia*, 41 Mass. App. Ct. 496, 499, 671 N.E.2d 984, 987 (App. Ct. 1996) (stating that "inadmissible profile evidence had the effect of identifying the defendant as a person likely to commit incestuous sexual abuse, and the complainants as children who testified truthfully to the occurrence of sexual abuse" (citation omitted)).

<sup>102</sup> See, e.g., *People v. Peterson*, 450 Mich. 349, 375-76, 537 N.W.2d 857, 869 (1995) (holding as error an expert's testimony "that children lie about sexual abuse at a rate of about two percent"); *Commonwealth v. Seese*, 512 Pa. 439, 441, 517 A.2d 920, 921 (1986) (stating it was impermissible for the expert to testify that "[i]t is very unusual that a child would lie about sexual abuse").

possesses certain characteristics indicative of truthfulness.<sup>103</sup> Another unacceptable technique is to pose a hypothetical question to an expert mirroring all of the essential facts in the case relating to the abuse, and then asking the expert whether those facts are consistent with abuse.<sup>104</sup>

Courts are divided over the admissibility of expert testimony describing “profiles” of sexual abuse victims, or sexual abuse “syndromes.”<sup>105</sup> To the extent that no consensus exists on the reliability of such psychological profiles, expert testimony that a child exhibits symptoms consistent with sexual abuse may invade the province of the jury to decide the credibility of the complaining witness.<sup>106</sup> Profile or syndrome testimony has been accepted when certain behavioral traits of sexual abuse

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<sup>103</sup> See, e.g., *Flowers*, 468 S.E.2d at 201 (holding that it was error to allow a child counselor to testify that the child met all of the criteria for truthfulness); *Commonwealth v. Garcia*, 403 Pa. Super. 280, 283-84, 290, 588 A.2d 951, 952, 956 (Super. Ct. 1991) (en banc) (ruling it was improper for an expert to explain why one-third of child victims take several years to report their attacks).

<sup>104</sup> See, e.g., *Commonwealth v. Federico*, 40 Mass. App. Ct. 616, 618, 666 N.E.2d 1017, 1019 (App. Ct. 1996); *Commonwealth v. Perkins*, 39 Mass. App. Ct. 577, 582-84, 658 N.E.2d 975, 979-80 (App. Ct. 1995); *People v. Archer*, 649 N.Y.S.2d 204, 206, 232 A.D.2d 820, 821-22 (App. Div. 1996).

<sup>105</sup> Compare *Commonwealth v. Allen*, 40 Mass. App. Ct. 458, 465, 665 N.E.2d 105, 110 (App. Ct. 1996) (stating that “an expert may testify about general syndromes associated with sexual abuse”), and *Peterson*, 537 N.W.2d at 868 (holding that the “prosecution may present evidence, if relevant and helpful, to generally explain the common postincident behavior of children who are victims of sexual abuse”), with *Hadden v. State*, 690 So. 2d 573, 577 (Fla. 1997) (finding it error to admit expert testimony that a child victim exhibits symptoms consistent with those displayed by a child who has been sexually abused), and *State v. Foret*, 628 So. 2d 1116, 1127 (La. 1993) (finding it error to allow expert testimony concerning syndrome evidence because such evidence has not attained scientific acceptance), and *State v. Bolin*, 922 S.W.2d 870, 873-74 (Tenn. 1996) (concluding that it is error to admit expert testimony on child sexual abuse syndrome).

<sup>106</sup> See, e.g., *Commonwealth v. LaCaprucia*, 41 Mass. App. Ct. 496, 498 n.3, 671 N.E.2d 984, 986 n.3 (App. Ct. 1996) (finding that scholarly studies of sexually abused children “caution that there are no ‘typical’ traits or common characteristics that portray child sexual abuse” (citations omitted)); *State v. J.Q.*, 130 N.J. 554, 573, 617 A.2d 1196, 1206 (1993) (discussing that the existence of symptoms may equally appear as a result of other disorders and does not necessarily prove abuse); *State v. Ballard*, 855 S.W.2d 557, 562 (Tenn. 1993) (stating that “[r]esearch has led us to conclude that no one symptom or group of symptoms are readily agreed upon in the medical field that would provide a reliable indication of the presence of sexual abuse” (citations omitted)).

victims—such as delay in reporting the abuse, refusing to acknowledge that the child had been victimized, or failing to remember specific events—may seem confusing or counter-intuitive to lay jurors.<sup>107</sup> Such testimony is commonly allowed when used as rehabilitative proof to counter discrediting suggestions raised by defense counsel.<sup>108</sup> Expert testimony also may be allowed to explain special interviewing protocols used to elicit information from child victims who are immature, frightened, or confused.<sup>109</sup> Expert testimony becomes highly problematic when the expert attempts to link a general profile or syndrome to the specifics of a case by opining that the facts are consistent with sexual abuse.<sup>110</sup> The expert then may be seen as tacitly validating the victim's claim of abuse, or the identity of the abuser. Prejudice is enhanced when the expert is the child's treating physician or therapist.<sup>111</sup>

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<sup>107</sup> See, e.g., *Peterson*, 537 N.W.2d at 863 (stating that "expert testimony concerning syndrome evidence is sometimes necessary to explain behavioral signs that may confuse a jury so that it believes that the victim's behavior is inconsistent with that of an ordinary victim of child sexual abuse" (citations omitted)); *People v. Archer*, 649 N.Y.S.2d 204, 206, 232 A.D.2d 820, 821 (App. Div. 1996) (admitting syndrome testimony "limited to explaining behavior that might appear unusual to a lay juror"); *State v. Leggett*, 164 Vt. 599, 600, 664 A.2d 271, 272 (1995) (stating an expert may testify that children who are sexually abused by a family member are more likely to delay reporting the incident than children who are abused by strangers).

<sup>108</sup> See, e.g., *Commonwealth v. Miner*, 562 Pa. 46, 50, 753 A.2d 225, 227 (2000) (allowing the prosecution to offer testimony of an expert that the absence of physical trauma is nevertheless consistent with alleged sexual abuse); see also *Peterson*, 537 N.W.2d at 867-68; *State v. Jones*, 71 Wash. App. 798, 819-20, 863 P.2d 85, 98-99 (Ct. App. 1993).

<sup>109</sup> See, e.g., *State v. Gersin*, 76 Ohio St. 3d 491, 494, 668 N.E.2d 486, 488 (1996).

<sup>110</sup> See, e.g., *Allen*, 665 N.E.2d at 110 (finding that an "expert must not connect the complainant to the syndrome"); *LaCaprucia*, 671 N.E.2d at 987 (stating that "the expert gave characteristic sexual profile testimony that presented the defendant's family situation as prone to sexual abuse, suggesting to the jury that this was a reliable factor as to whether sexual abuse occurred"); *Peterson*, 537 N.W.2d at 869 (finding error when the trial court allowed an expert to make numerous references to the consistencies between the victim's behavior and the behavior of typical victims of child abuse); *State v. Chamberlain*, 137 N.H. 414, 419, 628 A.2d 704, 707 (1993) (finding prejudicial error when an expert testified that the complainant's behavior was consistent with child sexual abuse victims); *J.Q.*, 617 A.2d at 1211 (finding prejudicial error when an expert testified that the victim's symptoms were consistent with sexual abuse).

<sup>111</sup> See *Allen*, 665 N.E.2d at 111 (suggesting that "it is the better practice to avoid using the treating therapist as an expert on syndromes associated with sexual abuse, as

By the same token, courts have allowed experts to testify on improper interviewing techniques of children and the possibility that a false memory has been implanted in a child through improper and suggestive interviewing techniques.<sup>112</sup> When a particularized showing is made that improper interview techniques were used, a party is allowed to introduce expert testimony to aid the jury in evaluating the reliability of a child's recollections and whether false memory has possibly been implanted.<sup>113</sup>

## X. Conclusion

Increasing concerns over prosecuting child sexual abusers and the immaturity, vulnerability and impressionability of children as witnesses have led courts and lawmakers to broaden procedural and evidentiary rules governing the testimony of child witnesses. This relatively recent development has made it much easier to prosecute persons accused of child sexual abuse. At the same time, these new rules raise serious questions about the reliability of the child's testimony and whether innocent persons are more likely to be convicted of extraordinarily serious crimes. Indeed, of the thirty child sexual abuse cases that went to trial in the 1980s, more than half of the convictions were reversed on appeal because of tainted testimony of child witnesses.<sup>114</sup>

As the above discussion demonstrates, courts have increasingly scrutinized on a case by case basis the application of the broadened procedural and evidentiary rules for child witnesses to determine whether these rules constitute a permissible adjustment of the traditional standards of trial practice in order to assist a traumatized child to give relevant testimony, or an impermissible interference with traditional principles of fairness

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it gives rise to the risk that such an expert's testimony 'can be construed as impliedly supporting the truthfulness of [the complainant]'" (citations omitted)); *LaCaprucia*, 671 N.E.2d at 988 (stating that a "therapist who testifies to general syndromes might be viewed as implicitly endorsing the complainant's testimony by virtue of the fact that she has accepted the complainant into therapy" (citations omitted)).

<sup>112</sup> See, e.g., *State v. Sargent*, 144 N.H. 103, 106, 738 A.2d 351, 354 (1999).

<sup>113</sup> See *Sargent*, 738 A.2d at 354.

<sup>114</sup> See Dana D. Anderson, Note, *Assessing the Reliability of Child Testimony in Sexual Abuse Cases*, 69 S. CAL. L. REV. 2117, 2117 n.1 (1996).



contained in constitutional guarantees of confrontation and due process. Whether the balance has been skewed too heavily in favor of effective prosecution at the expense of protecting a defendant's procedural rights is unsettled, but clearly it is one of the most controversial issues in criminal trial litigation today.